

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:12-HC-2209-FL

DAVID MORGENSTERN,

Petitioner,

v.

WARDEN JUSTIN ANDREWS,

Respondent.

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ORDER

This matter is before the court on respondent's motion for reconsideration (DE 11) regarding the court's July 26, 2013, order denying the government's motion to dismiss. The government cites In re Jones, 226 F.3d 328, 332 (4th Cir. 2000) for the proposition that petitioner's claims must be presented to the sentencing court for determination prior to being brought in this court, because petitioner has not filed a § 2255 motion concerning the allegations he raises in his current § 2241 petition. (Mot. to Reconsider at 1-2). As such, the government argues that petitioner cannot satisfy the "second prong" of Jones. (Id. at 2). Jones, however, does not state such a requirement. Rather, the second prong of the Jones test for applicability of the § 2241 savings clause requires only that "subsequent to the prisoner's direct appeal and first 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal." In re Jones, 226 F.3d at 334. The government does not identify any case interpreting Jones in the manner it proposes, and the court has found none. Indeed, the Fourth Circuit has since reiterated and applied the standard as stated in Jones. See, e.g., Rice v. Rivera, 617 F.3d 802, 807 (4th Cir. 2010).

Accordingly, the motion to reconsider will be denied. The court notes that while the court's July 26, 2013, addressed one ground raised for dismissal by the government, this ruling does not foreclose the government from raising alternative grounds of dismissal.

In sum, the government's motion for reconsideration (DE 11) is DENIED. In accordance with the court's July 26, 2013, order, the parties have twenty-one (21) days from the date of this order to file motions for summary judgment.

SO ORDERED, this the 3rd day of September, 2013.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style.

LOUISE W. FLANAGAN
United States District Judge